Federal Court  Cour fédérale

Date: 20170505

Dockets: T-473-06
T-474-06

Citation: 2017 FC 454

Toronto, Ontario, May 5, 2017

PRESENT: Case Management Judge Kevin R. Aalto

Docket: T-473-06

BETWEEN:

ALLAN JAY GORDON

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Docket: T-474-06

AND BETWEEN:

JAMES A. DEACUR AND ASSOCIATES LTD.
AND JAMES ALLAN DEACUR

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] As I said in Court, this case has lost its way.

[2] There seems to be a never-ending litany of issues concerning the conduct of the action and allegations of misbehaviour of the Plaintiffs and allegations of improper conduct by the Plaintiffs against counsel for the Defendant and on and on.

[3] These allegations recently escalated to impugn the integrity of the Court and seek my recusal as Case Management Judge all of which was contained in a spate of correspondence from the Plaintiff, Allan Jay Gordon.

[4] A case conference in person was convened in Court on Friday, March 10, 2017 to deal with these issues and to deal with the ongoing incivility which this case seems to generate. To emphasize that it was a Court proceeding the Court was gowned.

[5] By way of brief background, the individual Plaintiffs are accountants. They represent themselves although, from time to time, Mr. Deacur and his company have had legal representation. The case concerns claims against the Crown, (Canada Revenue Agency or CRA), for misfeasance, negligence and other torts arising from a criminal proceeding commenced by CRA in the early 1990's against the Plaintiffs for alleged fraud relating to Scientific and Research and Development Credits. After many years and a lengthy preliminary inquiry, the Crown dropped the charges.

[6] At the case conference convened to deal with the issues noted above I rendered oral reasons relating to the conduct of the action with the fervent hope that the parties, and the Plaintiffs in particular, would get the point about civility and what is required of parties in a lawsuit. I also dealt with the issue of conduct of the discovery and recusal. The oral reasons were transcribed and are set out hereafter. I have corrected syntax and typographical errors but not the substantive commentary:

> CASE MANAGEMENT JUDGE AALTO: Good morning, everybody, have a seat please:
>
> I have a number of things that I want to deal with this morning. Before I get to those, I want to deal with some unsettling issues which have evolved during the course of this week in this case, which are troublesome to me in a number of ways. We are in a courtroom today for this case conference. Why? Let me explain. This case has lost its way. Parties have forgotten that this is first and foremost a Court sitting and I emphasize a Court sitting.
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> Secondly, it's time to bring decorum back to this matter. In my view, this Court must take control of its processes and this case must be conducted in a courtroom. Much of the work in this case over the last six years has taken place in a boardroom. The boardroom has been beneficial from time to time and has allowed ease of decision-making in dealing with issues, but it also has led to this matter devolving into, from time to time, a battle in a sandbox: little or no Court formality. And while this has worked, as I said, for a while, it has led to a significant lack of respect for the process.
>
> It is my view that the Plaintiffs, in particular, do not have the right to use a proceeding in a Court to attack others, either the Court or counsel. It is not their personal place. It is a public institution and those that seek to make use of the courts to right a perceived or legitimate wrong do not have carte blanche to act inappropriately, speak offensively of others, or pursue personal agendas.
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> Notwithstanding my best efforts, this has not been happening and so we're going to have to change the way this case is conducted.
>
> This week has seen the second attack on my integrity in this proceeding and I get quite upset with people attacking my

integrity. I have admonished the parties from time to time to cease what seems like an endless back and forth squabbling over matters. It matters not who starts it, it simply is not an acceptable approach to the conduct of litigation in this Court.

This week has seen Mr. Gordon engaging in what I can only describe as a petulant writing campaign. He may disagree with decisions of this Court. If he does so, he has a right of appeal, not to engage in attacking others. It is not appropriate to write incendiary, verging on contemptuous correspondence, not of the Court, but also of counsel for the Crown, who is simply doing her job. Mr. Gordon may not appreciate that, but that's what happens in this Court.

By happenstance, I received this week a copy of *The Advocates' Journal*, a publication of The Advocates' Society and I was reading an article in this edition. It is by the late, great, Arthur Maloney. Maloney was one of the finest advocates to appear in the courts of Ontario and in his address at the call to the bar ceremony in 1978 he made the following observation:

> "Advocacy is imperfect and ineffective if it is without courtesy. Courtesy to the Court, the public, to the witnesses you examine in chief or that you may cross-examine and also to your colleagues at the bar."

I would add to that including those participating in the case.

Mr. Maloney goes on to say:

> "This is what Chief Justice Warren Burger had in mind when he wrote the foreword to Patterson's book, The Profession of Law. He said, 'Manners and decorum, especially in the courtroom, are the indispensable lubricant to the inherently contentious adversary process.'"

Civility, respect, and common sense have been sadly lacking in this case, notwithstanding my efforts to try and control it. So that brings me to what has transpired this week.

On Monday, we held a case conference at the opening of Mr. Deacur's examination for discovery. The first issue which we addressed was the issue raised in the letter by Mr. Deacur, sent to the Court some months ago, or thereabouts. And let me just observe now, I understand from Monday's session that that letter was not copied to Ms. Linden. It is a breach of Court protocol to

write to the Court without copying the other side. In fact, there are courts that do not accept correspondence from litigants unless it specifically is allowed by the judicial officer involved. In case management, I frequently receive correspondence from parties but it is a requirement of whatever correspondence I receive is copied to the other side. I made that observation on Monday and so let us turn back to the events of Monday.

Mr. Deacur's letter addressed the trial dates which I had set late last year and it was followed by a letter from Mr. Gordon of February 26th in which he echoed the concern of Mr. Deacur regarding the timing of the trial. That matter was dealt with and I advised the parties that I'd put in motion with the hearings coordinator trial dates that would not interfere with the busy season of these Plaintiffs. [Ed. Note: the trial dates were set in March- April - a time frame which interferes with the busiest time of year for these accountants]

Following that issue two matters were addressed, although obviously not to the satisfaction of Mr. Gordon. One issue related to Mr. Gordon having not responded to a letter which was sent back in December requesting certain information and documentation.

The second issue related to whether or not these Plaintiffs were properly armed to continue with discovery because they had not brought all of the documents which we have, over the years, had reduced to disks so that everybody could have ready access to those documents. I dealt with that issue on Monday.

In the course of it, of course, I made some observations regarding the frustrations that I have with this case and the frustration that I have with the Plaintiffs from time to time, and I invited Ms. Linden to bring a motion to dismiss the case if she was so instructed. What I did not say, of course, is that if such a motion were brought, I'm not going to hear it. I think somebody else should hear it and offer views on the Plaintiffs conduct in this piece. I may come back to that in a moment.

As a result of orders and my observations of the conduct of the Plaintiffs on Monday, and what might be considered a fit of pique, Mr. Gordon scrawled on his letter of February 26, 2017 a note, placed it in an envelope and addressed it to the Chief Justice of this Court. The note reads:

> "I am asking Prothonotary Aalto be removed from this case due to his improper, unreasonable and unfair behaviour."

This was followed on March 6th by an e-mail from Mr. Gordon:

> "To whom it may concern, I am asking that Prothonotary Aalto remove himself from this case as he is acting inappropriately, unfairly and in an unreasonable manner in the above listed cases. I will submit more detailed information that it is clear he has no interest or potentially not capable of acting in a proper manner in these cases."

That letter was followed by a further missive on March 7, 2017. That letter reads as follows:

> "Case intolerable to attend due to abuse by Federal officials.
>
> Prothonotary Aalto has set up a double standard, and is acting unfairly and unreasonably in the above cases.
>
> Due to the improper behaviour by Aalto."

And let me pause there -- I am not "Aalto". I am Your Honour, I'm Prothonotary Aalto, I am Case Management Judge Aalto. I am not Aalto in the context in which it's used in this letter. Let me continue.

> "Due to the improper behaviour by Aalto the Federal Lawyers in the case acting for the Respondents, are knowingly making false statements in court, and being completely rude and intolerable.
>
> The latest episode occurred yesterday in Court.
>
> After a question by the Respondent was finished, I was whispering to my Co-plaintiff."

Let me pause. There is nothing in our rules of practice or in the conduct relating to examinations for discovery that permit individuals, whether they be counsel or others to whisper in the ear of a witness. Period. Lawyers know that they are not allowed to answer for a witness or whisper answers to a witness during the course of an examination for discovery. It is a practice that goes

back into the mists of time. It will not be tolerated in this proceeding.

Let me continue.

> "The Respondent then said I could not continue the whispering because it would muddy the record."

Let me stop there again. Yes, it would muddy the record but quite apart from muddying the record it is entirely inappropriate and improper.

I continue with Mr. Gordon's letter.

> "Knowing that the Respondent had done that throughout their questioning I knew it was false. (Also I asked the court reporter who told me it was false my whispering would not be on the record.")

That is not the point. The point is it should not take place. Period.

I return to Mr. Gordon's letter.

> "The respondent then went on an abusive tirade. This type of unprofessional dishonest behaviour is not acceptable."

Well, I agree with the statement. Unprofessional, dishonest behaviour is not acceptable. I do not accept the conclusionary statements Mr. Gordon is making in his attack on Ms. Linden.

> "If the Respondent was at all concerned about the record they would have verified with the court reporter what was happening if the court reporter indicated there was a problem I would have apologized."

I will not repeat that that is not the issue. I have dealt with the issue earlier relating to this.

Last paragraph of the letter.

> "It is clear the federal Lawyer was knowingly making false statements in court due to the way Aalto has run these double standard proceedings.
>
> Yours very truly,

> Allan J. Gordon CPA, CA, LPA”

So that's Mr. Gordon's response to the Court and the conduct of the discovery.

The import of these letters, of course, is that he seeks to have me removed as Case Management Judge in this proceeding based on his vague allegations of unreasonable behaviour, double standard and the like. These types of letters are received by courts from time to time. It's not unusual that judges from time to time be asked to recuse themselves. In essence that's what Mr. Gordon is doing in this case.

Again, by happenstance, the Honorable Mr. Justice David Stratus of the Federal Court of Appeal had occasion to issue a decision dated March 2, 2017, in a case called Her Majesty the Queen in Right of Canada and the Attorney General of Canada, Applicants, and Ade Olumide, Respondent [2017 FCA 42].

Justice Stratus was sitting alone on this matter because it related to an issue that he was hearing as a single judge of the Federal Court of Appeal. It is a decision that deals in part with recusal and also deals with vexatious litigants. The part of the case that I want to emphasize, however, is that which deals with recusals. The respondent in that case had alleged bias against Justice Stratus and demanded that he recuse himself. Justice Stratus denied the request for recusal. He said this in respect of recusals:

> "The Chief Justice appointed me to deal with the latest motions and various proceedings brought by [the respondent] before the Court. I had no input into that decision. Having been appointed, I cannot recuse myself absent good legal cause."

Let me pause briefly there. I was appointed case management judge of this case on September 22nd, 2009, by the Chief Justice, by the then Chief Justice of this Court. As case management judge I was appointed to deal with all matters relating to this case leading up to trial, and to have it ready for a trial after all appropriate steps in the litigation were taken.

This case has had a tortured history. Notwithstanding my best effort to try and move it forward in a timely basis, we are now almost seven and a half years down the road, [Ed. Note: the case has seen motions re striking the claim, appeals, endless proceedings regarding production of third party client files of the Plaintiffs, privacy issues and ultimately production of thousands of

pages of documents in a data base which took a lengthy period of time to develop by the Crown] but at least a trial date in 2018 that doesn't interfere with the businesses of the Plaintiffs will take place.

I do not take the job of being a case management judge lightly. I took an oath when I took this appointment and I try every day to satisfy that oath to act fairly, impartially and as best as I can on issues between the parties. Frequently, when one makes a decision there is a party who is not particularly happy. It is the nature of the process. It's also one of the outcomes of this job.

Let me return to Justice Stratus' observations. He goes on to say the following:

> "The law is clear that good legal cause exists if I were biased in fact against [the respondent] or his case or were otherwise unable to decide the present matter fairly. Further, good legal cause exists if the legal test for apparent bias is made out. That test is whether a reasonable, fully-informed person, thinking the matter through, would conclude that it is more likely than not that I, whether consciously or unconsciously, would not decide the present appeal fairly."

Let me turn to this case.

The conclusionary statements in Mr. Gordon's letters do not provide good legal cause. They are merely his opinions of things, and this Court and many courts act on evidence. As Justice Stratus did in the Olumide case, I will not recuse myself absent good legal cause. That is the test to be applied. If judges ran for the hills every time any party questioned their impartiality, very little would get done in this Court or any Court. Dissatisfaction with the decision leads to appeals, not to recusals.

So where does this leave us?

A number of observations: Number one, as I said at the outset, this is a Court proceeding, not a sandbox proceeding. In future we will conduct meetings between the parties, case conferences in a courtroom and we will observe all of the process of a Court. That will include such matters as parties standing to address the Court, not speaking over each other, not making accusations about the opposite side. I simply will not tolerate interruptions that I have witnessed in the past again.

> Formal orders will be issued relating to matters that are decided during the case conferences. I have operated this case on the basis of directions from time to time in the hope that that would be a way to move this matter forward more efficiently. It hasn't worked. So we will now return to a more formal structure.
>
> I do not wish to receive correspondence from the parties unless I invite it.
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> Mr. Gordon in his correspondence was quite blunt that he wanted me removed from this case. He's free to bring a motion to recuse me. If he does, let us get this matter resolved now, not later. If he wishes to have me removed as the case management judge in this case, he shall bring a formal motion for recusal before the Court. It shall be served and filed on or before March 31, 2017. Motions for recusal are heard at first instance by the judge who is being asked to recuse him or herself. If the motion is brought, I will set a schedule for any responding material if the Crown wishes to engage in any issue. And then I will set a date to hear it in open Court. And whatever outcome may come of that motion, a formal order will result.
>
> . . .
>
> [The balance of the transcript is omitted as the hearing continued with an exchange between the Court and the parties concerning dates and discovery/production issues]

[7] Some additional observations need to be made. First, before issuing this Order I required a full copy of the transcribed transcript of the hearing which only recently became available. Second, none of the allegations against Ms. Linden or her alleged conduct are accepted by this Court. Third, the omitted portion of the transcript deals with exchanges between the Court, the Plaintiffs and Ms. Linden concerning the ongoing examinations for discovery which are being held in the courthouse so that I am able to attend to deal with issues as they arise. Fourth, the parties are to conduct themselves in accordance with my observations in Court and the Plaintiffs are to answer questions put to them in a forthright factual basis without opinion, editorializing or accusations. Fifth, in my commentary in Court, I ordered Mr. Gordon, should he so choose, to

seek to have me recused that he should bring a formal motion for recusal before the Court to be served and filed on or before March 31, 2017. That time has passed and Mr. Gordon has not done so. In the result there is no need to make that part of this formal order.

ORDER

THIS COURT ORDERS that:

1. Mr. Deacur's examination shall continue on whatever dates have been set aside and such examination shall take place in the absence of Mr. Gordon.

2. Mr. Gordon shall attend at the dates set for his discovery and on that discovery shall answer all proper questions put to him and not offer opinions, editorial comment or make accusations.

3. The examinations of the Plaintiffs shall be completed during the week of May 8, 2017 with the examinations of one party being completed in the absence of the other party.

4. The trial dates set for April 2018 are hereby vacated and new trial dates will be set by the hearings co-ordinator to the extent possible later in 2018.

"Kevin R. Aalto"
Case Management Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-473-06
STYLE OF CAUSE:	ALLAN JAY GORDON v HER MAJESTY THE QUEEN
AND DOCKET:	T-474-06
STYLE OF CAUSE:	JAMES A. DEACUR AND ASSOCIATES LTD. AND JAMES ALLAN DEACUR v HER MAJESTY THE QUEEN
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 10, 2017
ORDER AND REASONS:	AALTO P.
DATED:	MAY 5, 2017

APPEARANCES:

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Wendy Linden Rishma Bhimji	FOR THE DEFENDANT

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